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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Federal Communications Commission
Office of Secretary

In the Matter of

Implementation of the
Telecommunications Act of 1996

Amendment of Rules Governing
Procedures to Be Followed When
Formal Complaints Are Filed Against
Common Carriers

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CC Docket No. 96-238

NYNEX COMMENTS

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SUMMARY

The NPRM proposes reasonable measures to meet the very stringent deadlines for Commission action on complaints under the Telecommunications Act of 1996. In these comments, NYNEX suggests alterations or alternatives that would make the proposed procedures more effective.

The Commission's proposal to require the parties to engage in settlement discussions before a complaint is filed would be very helpful in avoiding the filing of unnecessary complaints. However, to make this effective, the Commission should require the parties to employ the services of Commission-certified mediators during such discussions. In addition, the Commission should reject a complaint if the mediator reports that the complainant did not pursue a settlement discussion in good faith.

Considering the very short filing dates that the Commission proposes for answers and other responsive pleadings, the Commission should require the parties to serve all documents that are under 50 pages by same-day facsimile.

The Commission should prohibit assertions based on information and belief unless (1) the complainant does not have reasonable access to information that would substantiate the allegation; (2) the information is in the sole possession of the defendant and the complainant has tried, unsuccessfully, to obtain the information from the defendant; and (3) the complainant presents circumstantial evidence or another basis for believing that the assertion is true.

NYNEX opposes the Commission's proposal to require complaints, answers, and replies to include (1) the name, address and telephone number of any persons likely to have discoverable information relevant to the disputed facts; and (2) a copy, or a description by category and location, of all documents, data compilations, and tangible things in the possession, custody or control of the party that are relevant to disputed facts. While this may be analogous to the requirements of the Federal Rules of Civil Procedure, it would be unduly burdensome in the context of the short time frames for filing answers in the Commission's complaint proceedings.

The Commission should not retain self-executing discovery, even if the number of interrogatories is other than the 30 allowed under the current rules. At the status conference, the Commission's staff should determine whether answers to interrogatories are necessary to resolve the complaint in light of the disputed allegations and the evidence already presented.

To make status conferences more productive, the Commission should require the parties to send representatives to the status conference who would have the authority to make binding stipulations, settlements, and other agreements.

The Commission should establish a legal standard for cease and desist orders and other types of interim relief based on the standard for issuing temporary restraining orders, as discussed in paragraph 61 of the NPRM.

NYNEX agrees with the Commission's proposals to permit complainants to bifurcate liabilities and damages issues. A party seeking damages should be required to provide a detailed computation of such damages in its complaint.

The Commission should not bar counterclaims under any circumstances if the statute of limitations has not run on such claims. Such a rule could force a defendant to file a claim against a complainant before it is prepared to make its case.

The Commission should make it clear that it intends to rule on motions to dismiss early in the proceedings where a complainant has not complied with the format and content rules, and where a complainant has not presented a factual or legal basis for the relief requested. The Commission should require the defendant to file motions to dismiss no later than the date for answers, and it should rule on such motions at the initial status conference.

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NYNEX COMMENTS

The NYNEX Telephone Companies¹ ("NYNEX") hereby file their Comments on the Commission's Notice of Proposed Rulemaking ("NPRM") to revise its rules for the handling of formal complaints against common carriers.²

I. Introduction

In the NPRM, the Commission proposes changes to its procedures for handling complaints against common carriers to comply with the deadlines set forth in the Telecommunications Act of 1996.

¹ The NYNEX Telephone Companies are New York Telephone Company and New England Telephone and Telegraph Company.

² Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 96-328, Notice of Proposed Rulemaking, FCC 96-460, released November 27, 1996.

NYNEX supports the Commission's proposals. The Commission recognizes that it needs to make its complaint procedures more effective and more efficient if it is to meet the very strict deadlines for dispute resolution that were established in the Telecommunications Act of 1996. In these comments, NYNEX suggests alterations or alternatives that would make the proposed procedures more effective.

II. Proposed Amendments to Rules of Practice and Procedure

A. Pre-Filing Procedures and Activities

NYNEX supports the Commission's proposal to require a complainant to certify that it has discussed, or attempted to discuss, the possibility of good faith settlement with the defendant carrier prior to filing a complaint.³ Pre-filing settlement discussions would help to resolve disputes without Commission intervention, and they would also help to narrow the issues that are filed in complaints.

However, the proposed rule is not likely to result in serious settlement discussions in most cases. Complainants could meet the proposed certification requirement by providing a letter or other evidence that they demanded relief from the defendant, together with a letter from the defendant refusing the demand.⁴ Such information often accompanies complaints that are filed under

³ See *id.*, para. 28.

⁴ See proposed Section 1.721(a)(8).

the current procedures. Nonetheless, serious settlement discussions usually do not occur until the complaint has been filed and the Commission's staff has become involved.

To encourage meaningful settlement discussions, the Commission should require a complainant to seek the intervention of a Commission-certified mediator before filing a complaint.⁵ Mediation is often an effective alternative dispute resolution ("ADR") mechanism, because it brings the parties together and provides a neutral person to help facilitate discussions. This could result in satisfactory resolution of many disputes before they are brought to the Commission's attention. The complainant should be required to submit evidence that it had attended a settlement conference, or that the defendant had refused to attend. This requirement would not be burdensome, since even one meeting with a mediator would reveal whether there was a meaningful chance of a mutually acceptable settlement. To this end, the Commission should require the complainant to submit a statement from the mediator that the complainant participated in a good faith effort to reach a settlement.⁶

⁵ The Commission should certify a group of persons who would make themselves available, at the parties' expense, for mediation or arbitration in alternative dispute resolution procedures involving Commission complaints.

⁶ The Commission should not allow the mediator to reveal any statements made by the parties at a settlement conference, since that would discourage the parties from making concessions or compromises as part of the negotiations. The mediator should only be allowed to render an opinion about whether the parties negotiated in good faith.

The Commission requests comments on whether it should provide for voluntary consultation with a committee composed of neutral industry members to address technical or business disputes before a complaint is filed.⁷ This would not be as productive as a mediation requirement. Carriers already have access to industry forums such as the Carrier Liaison Committee and the Network Interconnection/Interoperability Forum to discuss technical issues and to develop industry standards. Complaints with the Commission usually involve disputes between individual companies rather than issues affecting the industry. While the Commission may need technical information to resolve a dispute, the complainant should be required to submit that information, including reference to any industry standards.

B. Service

NYNEX supports the Commission's proposals for accelerating the procedure for serving complaints on carriers.⁸ The current procedure, whereby a complaint is filed with the Commission and the Commission then forwards the complaint to the defendant, wastes time and adds nothing to the record. We recognize that Section 208 of the Act requires the Commission to forward a complaint to the affected carrier. However, this requirement can be met by having the complainant serve the defendant as agent for the Commission on the

⁷ See NPRM, para. 29.

⁸ See *id.*, para. 31.

same date that it files the complaint with the Commission. The Commission's proposal to establish an electronic directory of carriers' agents for service of process should make it easy for a complainant to identify the person upon whom it should provide service for the defendant.

The Commission proposes to require all subsequent pleadings to be served by overnight mail or by facsimile followed by mail delivery.⁹ Considering the short filing periods that will be necessary to meet the statutory deadlines for the processing of complaints, the Commission should require same day service by facsimile unless the filing is more than 50 pages. When designating an agent for service of process, a party should also indicate the telephone number of the person to which service by facsimile should be made.

C. Format and Content Requirements

NYNEX agrees with the Commission's proposal to prohibit complaints that rely solely on assertions based on "information and belief."¹⁰ However, the Commission should recognize that few complaints rely solely upon such assertions. Therefore, the proposed rule would have little practical effect.

Instead, the Commission should prohibit assertions based on information and belief unless (1) the complainant does not have reasonable access to

⁹ See *id.*, para. 35. We presume that service by facsimile must occur on the same day that a filing is due, while service by overnight mail would result in a carrier receiving the filing on the day after the filing was due.

¹⁰ See *id.*, para. 38.

information that would substantiate the allegation; (2) the information is in the sole possession of the defendant and the complainant has tried, unsuccessfully, to obtain the information from the defendant; and (3) the complainant presents circumstantial evidence or another basis for believing that the assertion is true. This would prevent complainants from making baseless assertions, and it would encourage complainants to gather the necessary facts before submitting a complaint.

NYNEX strongly supports the Commission's proposal to require complaints to be accompanied by documents and other materials that support the complaint. Typically, complainants file "bare bones" complaints with numerous allegations, but with little or no documentation. The Commission should require a complainant to include with its filing all information upon which it intends to rely, other than information that is solely in the possession of the defendant and which the complainant has unsuccessfully sought to obtain from the defendant. This requirement would allow the Commission to process complaints more quickly, since it would have access to the relevant information from the beginning, and since discovery would be limited to information that can only be obtained from the defendant. We agree that complaints that do not meet this requirement should be summarily dismissed.

NYNEX also supports the Commission's proposal to require complaints to describe in detail the sections of the Act alleged to have been violated, and the

injury alleged to have been sustained, together with supporting legal analysis.¹¹ This should require the complainant to present, in effect, its initial brief setting forth the legal arguments concerning the alleged violation.

Typically, a complainant does not submit its legal arguments until the briefing stage, well after the complaint has been filed. The defendant has to file an answer without knowing the full legal basis for the complaint, and the defendant often has to wait until it receives the complainant's initial brief before being able to file a complete response. This wastes valuable time. Since the complainant is under no time constraint in preparing the complaint, it should be required to complete a full factual and legal analysis before it starts the statutory clock by filing the complaint with the Commission.

NYNEX opposes the Commission's proposal to require complaints, answers, and replies to include (1) the name, address and telephone number of any persons likely to have discoverable information relevant to the disputed facts; and (2) a copy, or a description by category and location, of all documents, data compilations, and tangible things in the possession, custody or control of the party that are relevant to disputed facts.¹² While this may be analogous to the requirements of the Federal Rules of Civil Procedure, it would be unduly burdensome in the context of the short time frames for filing answers in the Commission's complaint proceedings. The Commission proposes to allow only

¹¹ See *id.*, paras. 40-41.

¹² See *id.*, para. 43.

20 days for answers to formal complaints.¹³ It would be extremely difficult for a defendant to identify all of the persons who had information and all of the documents that might be relevant to the facts alleged in a complaint in that time period. It would also be inconsistent with the Commission's proposal to limit automatic or self-executing discovery. The Commission should leave the issue of identifying relevant documents to the discovery phase of the proceeding, rather than make it an automatic part of the answer and reply filings.

The Commission proposes to waive the form and content requirements for complaints if a party shows "good cause."¹⁴ The proposed rules do not define good cause. The Commission should define good cause as a showing of financial hardship or other public interest factor. In addition, the Commission should adopt a presumption that carriers with more than 0.05% of nationwide telecommunications revenues are not entitled to a waiver. The public interest factor should only cover practical difficulties in compliance, and not factors such as the importance of the issues to the complainant or other policy-type factors.

D. Answers

NYNEX supports the Commission's proposal to reduce the filing period for answers to 20 days after service or receipt of a complaint by the carrier, assuming that the Commission adopts rules to require the complainant to

¹³ See *id.*, para. 47.

¹⁴ See *id.*, para. 44.

include with the complaint the documents and other factual materials, together with its legal and factual arguments, that it intends to rely upon in support of the complaint.

E. Discovery

NYNEX supports the Commission's proposal to eliminate self-executing and automatic discovery.¹⁵ The parties should be required to include up to 30 proposed interrogatories with their complaints, answers and replies. Objections to discovery requests should be required prior to the initial status conference. At the status conference, which would be held 10 days after filing of an answer to a complaint,¹⁶ the Commission's staff should determine whether answers to some or all of the interrogatories are necessary to resolve the complaint in light of the disputed allegations and the evidence already presented. The staff should also determine the extent of discovery and the timetable for response depending on the nature of the information requested. Such case-by-case decisions on discovery requests would not be burdensome, since they would be done as part of the staff's efforts at the status conference to narrow the issues and to elicit stipulations of undisputed facts.

The Commission should not retain self-executing discovery, even if the number of interrogatories is other than the 30 allowed under the current rules.¹⁷

¹⁵ See *id.*, para. 50.

¹⁶ See *id.*, para. 58.

¹⁷ See *id.*, para. 51.

Parties would tend to file the maximum allowed number of interrogatories, as they do now, even if the information requested would not be particularly useful. Considering the large volume of complaints that are likely to be filed due to the many new issues created by the Telecommunications Act of 1996, unnecessary discovery requests could make it difficult for the parties and the Commission's staff to meet the short statutory deadlines for action on complaints.

The Commission should not require the parties to file documents received through exchange of documents in the pleadings, or through the discovery process, with the Commission unless a party intends to rely upon those documents to support its case. The Commission correctly observes that the routine filing of documents that are of no decisional significance would be burdensome on both the parties and the Commission's staff.¹⁸

F. Status Conferences

The Commission's proposal to convene early status conferences in all complaint proceedings is likely to be the most effective mechanism for meeting the statutory deadlines.¹⁹ Section 1.733 of the Commission's rules already gives the Commission's staff the authority to convene status conferences for the purposes of simplifying and narrowing the issues, amending the pleadings, obtaining admissions of fact and stipulations, eliciting settlements, obtaining

¹⁸ See *id.*, para. 53.

¹⁹ See *id.*, para. 58.

additional discovery, and scheduling briefs and other procedures. These provisions give the staff effective tools for resolving complaints, whether through settlement or Commission decision. As many issues as possible should be resolved in the initial status conference. To that end, the Commission should require the parties to send representatives to the status conference who would have the authority to make binding stipulations, settlements, and other agreements.

The Commission should not require the parties to submit joint proposed orders memorializing the oral rulings made by the staff at status conferences.²⁰ The parties may have different views over what was decided, which could generate additional rounds of correspondence and status conferences. While the current practice places the burden on the staff to issue an order after a conference, it avoids creating further controversy that could delay the proceedings.

G. Cease and Desist Orders and Other Forms of Interim Relief

The Commission should establish a legal standard for cease and desist orders and other types of interim relief based on the standard for issuing temporary restraining orders, as discussed in paragraph 61 of the NPRM. A cease and desist order can cause financial and operational harm to a carrier based on allegations that ultimately might be found groundless. For this reason, courts

²⁰ See *id.*, para. 59.

normally do not grant such interim relief unless a plaintiff shows that it is likely to prevail on the merits, that the plaintiff will suffer irreparable harm absent injunctive relief, that other parties will not suffer substantial injury, and that the requested relief is in the public interest. A similar standard should apply to requests for cease and desist orders in complaints against carriers. The Commission should require the posting of bond by the complainant to pay for the carrier's damages if the Commission later finds that the complaint was without merit.

These provisions also should apply to requests for an order requiring a carrier to "cease engaging" in violations of sections 260 and 275 and to requests for cease and desist orders under Section 274(e)(2).²¹ Since orders under these sections are in the nature of injunctive relief, and since they would be issued prior to a final decision on the merits, they should not be issued unless a complainant makes a strong case that the carrier is violating the Act, and that the other standards concerning substantial harm and a balancing of the interests have been met.

H. Damages

NYNEX supports the Commission's proposal to allow a complainant to voluntarily bifurcate its complaint into a liability phase and a damages phase.²²

²¹ See *id.*, para. 62.

²² See *id.*, para. 64.

This would make it easier for the Commission to decide the substantive issues of liability within the statutory deadlines for action on complaints, while preserving the parties' rights to a full investigation of the issues of injury and damages.²³ In cases where no liability was found, bifurcation would save all parties the time and expense of a damages inquiry. Where liability was found, the parties would often reach a settlement on the amount of damages without further Commission proceedings.

NYNEX agrees that a party seeking damages should provide a detailed computation of such damages in its complaint.²⁴ Today, complainants normally file a general claim for damages, sometimes not even including the amount. This does not give the defendant an opportunity to answer the factual basis for the damages claim. If a complainant does not want to go through the expense of quantifying its damages claim until the Commission decides in its favor on the issue of liability, it can ask that the liability and damages claims be bifurcated.

I. Cross-Complaints and Counterclaims

The Commission proposes to bar counterclaims arising out of the same subject matter as the complaint, unless the counterclaim is filed concurrently

²³ If bifurcation were voluntary, it would not contravene the statutory deadlines, as the party that would be in a position to insist that the Commission meet those deadlines would have waived its rights by agreeing to bifurcation.

²⁴ See *id.*, para. 66.

with the defendant's answer.²⁵ The Commission should not bar counterclaims under any circumstances if the statute of limitations has not run on such claims. Such a rule could force a defendant to file a claim against a complainant before it is prepared to make its case. A carrier may not be able to develop the factual basis for a counterclaim, or even to discern its existence, within the 20 day time period for filing an answer to a complaint.

Rather than adopting a category of compulsory counterclaims, the Commission should simply require a defendant to include in its answer any counterclaims and crossclaims that it wants adjudicated in the same proceeding. This would allow the Commission to decide such claims within the statutory deadlines without prejudicing the rights of the defendants.

J. Replies

NYNEX supports the Commission's proposal to prohibit replies to answers except where a complainant can show that it is replying to affirmative defenses and that it is relying upon factual allegations that are different from any denials contained in the answer.²⁶

²⁵ See *id.*, para. 70. Counterclaims not arising out of the same subject matter, and cross-claims arising out of the same transaction, would be permissive.

²⁶ See *id.*, para. 72.

K. Motions

NYNEX supports the Commission's proposed restrictions on motions.²⁷

However, the Commission should not make a failure to file an opposition to a motion grounds for granting the motion absent a showing that the party was served with the motion and did not have good cause for its failure to respond in a timely fashion.

The Commission should also make it clear that it intends to rule on motions to dismiss early in the proceedings where a complainant has not complied with the format and content rules, and where a complainant has not presented a factual or legal basis for the relief requested.²⁸ The Commission will have a difficult time meeting the short statutory deadlines for complaint proceedings if it does not dismiss meritless cases at the outset. Motions to dismiss should be required no later than the date for filing answers, and such motions should be ruled upon no later than the date of the initial status conference.

L. Confidential or Proprietary Information and Materials

NYNEX supports the Commission's proposal to allow a party to designate as proprietary any materials that it produces in the course of a complaint

²⁷ See *id.*, paras. 74-78.

²⁸ In the past, the Commission has often waited until after a case has been fully briefed before acting on motions to dismiss.

proceeding.²⁹ Such material should be protected from public disclosure, and should be subject to the nondisclosure provisions of Section 1.731 of the Commission's rules, until a party successfully challenges the proprietary designation.

M. Other Required Submissions

NYNEX supports the Commission's proposal to require the parties to submit a joint statement of stipulated facts and key legal issues.³⁰ This would promote a meeting of the minds on narrowing the legal and factual issues prior to the initial status conference. However, the Commission should not require the parties to submit the joint statement within 5 days of the date that an answer is filed. Since the status conference would be held 10 days after the answer was filed, the Commission should allow the parties 7 days to prepare a joint statement. This would allow more time for negotiation without delaying the proceedings.

We agree that the Commission need not require the filing of briefs if discovery is not conducted.³¹ If the Commission adopts its proposals to require the complainant to include all of the legal and factual support in the initial filing, subsequent briefs would be superfluous. If a complainant can demonstrate, at the status conference, that it needs to present additional arguments as a result of

²⁹ See *id.*, para. 79.

³⁰ See *id.*, para. 80.

³¹ See *id.*, para. 81.

matters contained in the defendant's answer, the staff can allow further briefing on narrowly-tailored issues. The staff should also establish a timetable for further briefing as necessary in each case to allow the case to be decided within the statutory deadlines.

N. Sanctions

NYNEX agrees with the Commission that it should dismiss, with prejudice, complaints that do not satisfy the form and content requirements of the Commission's rules.³² Likewise, a failure to respond to a properly-served complaint would be grounds for summary ruling in favor of the complaint.

O. Other Matters

NYNEX disagrees with the Commission's tentative finding that the term "act on" regarding the deadline for Commission action on complaints under Section 271(d)(6)(A) that a Bell Operating Company ("BOC") has ceased to meet the conditions for approval of its in-region interLATA services could be met with a Bureau order imposing sanctions, and that this would not constitute "final action" by the Commission.³³ Any such Bureau action could have serious impacts on a BOC, including injunctive relief, penalties, and withdrawal of interLATA authority. An affected BOC could not seek judicial review of a Bureau order until the Commission had reviewed the Bureau order and issued a

³² See *id.*, para. 85.

³³ See *id.*, para. 86.

final order.³⁴ Since there is no time limit on a petition to the Commission for review of a Bureau order, the BOC could be effectively foreclosed from judicial review of the Bureau's action. Section 271(d)(6)(B) clearly contemplates action by the Commission on such complaints within 90 days, and this function should not be delegated to the Commission's staff.

III. Conclusion

The Commission's proposals represent reasonable measures to meet the very stringent deadlines for Commission action on complaints under the Telecommunications Act of 1996. With the modifications recommended herein, NYNEX believes that the Commission's proposals properly balance the interests of both complainants and defendants in such proceedings.

Respectfully submitted,

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³⁴ See 47 U.S.C. Section 5(c)(7).